(5)

No. 89-568

In the Supreme Court of the United States

OCTOBER TERM, 1989

CHRYSLER CORPORATION, ET AL.,
PETITIONERS

v.

STANLEY SMOLAREK AND RALPH FLEMING,
RESPONDENTS

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF OF PETITIONERS

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A. The Fleming Case

Respondent Ralph Fleming makes the incorrect and incomprehensible assertion in his brief in opposition (at 1) that a "quirk of timing" has generated such confusion in this case as to render it *sui generis* and make review by this Court unwarranted. Fleming's brief then proceeds to distort the procedural history of the case in an apparent effort to persuade the Court that its posture is somehow so peculiar that only a remand to the district court can make sense. That simply is not so.

The Michigan Handicapper's Civil Rights Act ("HCRA"), enacted in 1977, has undergone no change in the pertinent language defining a "handicap" and prohibiting discrimination "because of a handicap that is unrelated to the individual's ability to perform the duties of a particular job or position" (Pet. 2-3). This language is clear and straight-forward. The Michigan Supreme Court's 1986 decision in *Carr* v. *General Motors Corp.*, 425 Mich. 313, 389 N.W.2d 686 (1986), merely confirmed that the

Michigan Legislature did not intend to require accommodation of job-related handicaps. The Michigan Supreme Court had never interpreted the clear language of the statute to the contrary.

The suggestion in Fleming's brief (at 4) that "[d]ue to a quirk of timing" the district court "did not construe the HCRA, under the *Carr* decision" is both irrelevant and untrue. *Carr* created nothing new, but, even if it did, the district court took *Carr* into account when it granted Chrysler's motion for summary judgment *the year after Carr was decided.* The Sixth Circuit Court of Appeals also took *Carr* into account in reviewing the grant of summary judgment. There is no known rule of law or procedure, as suggested in Fleming's brief (at 5), that the examination of a complaint for preemption purposes may be conducted only by a district court, and not by an appellate court, or that the examination of the complaint must be in light of the *law* "at the time the complaint was filed."[1]

In sum, Fleming's case is procedurally ripe and appropriate for review by this Court. Removal jurisdiction is undisputed. The district court found Fleming's HCRA claim preempted by Section 301 because it sought accommodation for a job-related handicap — a right that exists, if anywhere, only in the Chrysler-UAW collective bargaining agreement (Pet. 5-6). The Sixth Circuit's 8-7 *en banc* reversal of that holding is properly before this Court, and raises an important question affecting federal labor policy meriting review by this Court.

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[1] In this regard, Fleming's brief appears to have confused the general rule that removal jurisdiction is tested by reviewing the complaint as of the time of removal. See *American Fire & Cas. Co.* v. *Finn,* 341 U.S. 6, 14 (1951); *Salem Co.* v. *Manufacturer's Co.,* 264 U.S. 182, 189 (1924); 14A Wright, Miller & Cooper, *Federal Practice & Procedure* § 3721 at 213 & n.79 (1985). Removal jurisdiction is conceded in Fleming's case, and no issue is presented with respect thereto, in light of the district court's unappealed holding that Fleming's claims for breach of good faith and fair dealing and interference with the pursuit of his occupation were preempted by Section 301 (Pet. 6 & n.1).

B. The Smolarek Case

Respondent Stanley Smolarek's brief also seeks to divert attention from the factual allegations of his complaint (attached as an appendix to Smolarek's brief). Smolarek's actual allegations bear repeating: He alleged that his medical condition "has been unrelated or *substantially unrelated* to his ability to perform the duties of his job" (¶11); that he suffered a seizure and "was disabled following that incident for approximately two weeks" (¶¶12-13); and that Chrysler refused to return him "to his former position or *another position consistent with his medical restrictions* and has maintained [him] instead on a disability lay off indefinitely" (¶16) (emphasis added). Smolarek's complaint thus concedes that his condition may, in some respect, be "related to" his ability to perform his regular job, and also complains that Chrysler refused to give him another job consistent with his medical restrictions. In these two respects Smolarek seeks accommodation of a job-related handicap unavailable under the HCRA — available, if at all, only under the Chrysler-UAW labor contract.[2]

Smolarek makes the novel argument to this Court that, because he orally disclaimed reinstatement to another position during argument before the *en banc* court of appeals in 1989, Chrysler's removal of his complaint in 1986 should be deemed improper (brief at 3). Smolarek cites no authority for this proposition, which is directly contrary to the rule, noted above, that removability is tested by reviewing the complaint as of the time of removal. Smolarek's suggestion (*id.*) that "there has been

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[2] Even what Smolarek identifies as the "essence" of his claim, i.e., "that Chrysler refused Smolarek an opportunity to return to his former job" (Smolarek brief at 4) entails an accommodation claim exceeding the scope of the HCRA because it would require *continued* accommodation of Smolarek's medical condition.

a change in the law" concerning accommodation under the HCRA is also incorrect, for the reasons noted above.[3]

Smolarek's brief (at 7) has mischaracterized the dissenting opinion of Sixth Circuit Judge Kennedy by suggesting that it applied only to that portion of respondents' complaints that "sought reinstatement to a position other than the ones they had held" and that "the Sixth Circuit was unanimous" that Chrysler's removal was "improper to the extent that Smolarek was seeking reinstatement to his original position." To the contrary, Judge Kennedy's opinion neither joined the majority nor opined on this point, "mak[ing] no attempt to resolve this question today, since it would merely be dicta in a dissent" (Pet. App. 22a). Furthermore, Judge Kennedy went on to state that Smolarek's "floor of rights" theory, concerning reinstatement to his former position which itself required *continued* accommodation, would "impermissibly bootstrap an accommodation requirement into the HCRA" and would accordingly be preempted by Section 301 (*id.* at 25a).

Smolarek's brief (at 11-14) has misconceived this Court's decisions concerning the order and allocation of proofs in employment discrimination cases. See *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). Respondents' proof of a *prima facie* case of discrimination, in the context of their claims, includes proof that Chrysler was required to accommodate job-related handicaps. Without such accommodation, respondents are not "qualified" for the positions they seek. But that accommodation requirement exists only in the collective bargaining agreement — not in the HCRA. Accordingly, the labor contract's accommodation provisions are not a "defense" to respondents' handicap discrimination claims, but are instead *essential ele-*

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[3] Smolarek could have, but did not, move to dismiss certain claims or to amend his complaint in the district court. Smolarek's complaint remains unchanged from the date it was filed.

ments of respondents' *prima facie* case.[4] Finally, Smolarek's statement (brief at 14) concerning his "pretext" claim positively establishes the interdependence between his discrimination claim and the terms of the collective bargaining agreement. To promise that he will not "quibbl[e] with Chrysler over interpretation" of the agreement cannot negate its fundamental linkage to his claim.

The Ninth Circuit's decision in *Miller* v. *AT&T Network Systems*, 850 F.2d 543 (9th Cir. 1988), is inapposite because the Oregon handicap discrimination statute affirmatively required accommodation of job-related handicaps whereas the Michigan HCRA does not. The same is true of the Nintl Circuit's analysis of a California handicap discrimination statute in *Ackerman* v. *Western Electric Co.*, 860 F.2d 1514 (9th Cir. 1988). As explained in Chrysler's petition (at 27 n.10), the employees in *Miller* and *Ackerman* were relying upon statutory rights to accommodation that were "parallel" to any accommodation rights created by the collective bargaining agreement. The opposite is true here, as the Michigan Court of Appeals has twice recently held in rejecting the Sixth Circuit's conclusion here: *Cuffe* v. *General Motors Corp.*, 180 Mich. App. 394, ____ N.W.2d ____ (1989); *Metro* v. *Ford Motor Co.*, ____ Mich. App. ____, ____ N.W.2d ____ (Aug. 25, 1989).

Smolarek's brief (at 23-25) highlights the conflict between the Sixth Circuit's decision here and the Seventh Circuit's decision in *Douglas* v. *American Information Technologies Corp.*, 877 F.2d 565 (7th Cir. 1989). While the state-law theory was labelled differently in *Douglas*, the disabled employee's claims also arose from, and required interpretation of, the collective bargaining

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[4] Contrast *Caterpillar Inc.* v. *Williams*, 482 U.S. 386 (1987) (NLRA preemption defense); *Franchise Tax Board of California* v. *Construction Laborers Vacation Trust*, 463 U.S. 1 (1983) (ERISA defense). In those cases, unlike the instant claims of respondents, the "defenses" were purely affirmative in character and unrelated to the plaintiffs' *prima facie* claims. Additionally, even if Chrysler were required to articulate (not prove) a "defense" under the collective bargaining agreement, to establish "pretext" under *Burdine*, *supra*, respondents must still prove, *as part of their case*, that the collective bargaining agreement does not apply.

agreement. In addition, the Seventh Circuit specifically held that the existence of the agreement's provisions as a "defense" to the state-law claims also triggered Section 301 preemption — directly contrary to the Sixth Circuit's holding here.

C. Federal Labor Policy

Fleming's and Smolarek's briefs in opposition concede by their silence that the Sixth Circuit's opinion in this case implicates the federal labor relations policy requiring preemption of claims that are grounded in, or require interpretation of, collective bargaining agreements. As this Court admonished in *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202, 211 (1985), respondents' state-law claims, triable to juries, raise the potential for "all the evils" addressed by the Court in *Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95 (1962): Parties to labor contracts would be "uncertain as to what they were binding themselves to," "it would be more difficult to reach agreement, and disputes as to the nature of the agreement would proliferate." *Lueck*, 471 U.S. at 211.

Moreover, as the seven dissenting Sixth Circuit judges cautioned, the majority's "overbroad precedent against finding §301 preemption" would "permit[ ] an individual to side-step available grievance procedures[,] * * * cause arbitration to lose most of its effectiveness, [and] eviscerate a central tenet of federal labor contract law under § 301 that it is the arbitrator, not the court, who has the responsibility to interpret the labor contract in the first instance." *Lingle* v. *Norge Division of Magic Chef*, 486 U.S. ____, 108 S.Ct. 1877, 1884 (1988); *Lueck*, 471 U.S. at 220.

Respondent Smolarek suggests (brief at 6) that Chrysler is attempting to use the collective bargaining agreement "as an artifice to circumvent Smolarek's legislatively mandated parallel state remedies" — implying that his state-law discrimination claim stands on a special footing. This Court rejected such a notion in *Lingle*, where it made plain that state-law claims, even though involving *nonnegotiable* rights, would be preempted by

Section 301 if, "at least in certain instances," they "turned on the interpretation of a collective bargaining agreement." 108 S.Ct. at 1882 n.7. The Court further held that anti-discrimination laws actually "illustrate the relevant point for § 301 preemption analysis" — whether "the existence or the contours of the state-law violation [is] dependent upon the terms of the [labor] contract." *Lingle,* 108 S.Ct. at 1885. That test is satisfied here.

D. Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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